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Supreme Court of the United States

OCTOBER TERM, 1946

No. 710

EDWARD SCHWARZ, JEREMIAH LOTT, JOSEPH K. BROWN, DOROTHY O. HAMSTRA and MAPLECREST CIVIC ASSOCIATION,

Petitioners,

v.

TOWNSHIP COMMITTEE OF MAPLEWOOD, NEW JERSEY, BUILDING INSPECTOR OF MAPLEWOOD, NEW JERSEY, and THE FEDERAL PUBLIC HOUSING AUTHORITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY, AND BRIEF IN SUPPORT THEREOF

MILTON M. and ADRIAN M. UNGER,
Counsel for Petitioners,
11 Commerce Street,
Newark 2, N. J.

ADRIAN M. UNGER,
Of Counsel.

ADAMS PRESS, 11 Commerce Street, Newark, N. J. MArket 3-8611

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Supreme Court of the United States

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No. .....

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TOWNSHIP COMMITTEE OF MAPLEWOOD, NEW JERSEY, BUILDING INSPECTOR OF MAPLEWOOD, NEW JERSEY, and the FEDERAL PUBLIC HOUSING AUTHORITY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

A

Summary Statement of the Matter Involved

This case is apparently of novel impression. The substantive question presented to the court below was whether a public park can be used by governmental authorities for temporary housing in violation of a restrictive covenant in a deed and a dedication, both of which limited the use to park purposes. The Supreme Court of New Jersey has refused to decide the merits of this controversy in-

volving duly asserted federal constitutional rights and has denied petitioners any relief even though the court concedes that, if it were to decide the case on its merits, petitioners would prevail. (Opinion, R. 155; Judgment appealed from, R. 6). Its decision precludes appeal to the New Jersey Court of Errors and Appeals or any further relief in any court of New Jersey.

We are not presenting or urging here the non-federal grounds. This Court is not asked to decide all the substantive merits of the controversy or, unless it wishes, even the federal questions involved. Since the decision appealed from does not rest on any adequate non-federal ground, the matter can be remanded to the New Jersey Supreme Court with the direction that it decide the merits of the controversy, at least insofar as federal questions are involved. We do not say that this Court should not now decide the federal questions—only that it need not decide them at this time. The refusal of the New Jersey Supreme Court to decide a properly presented controversy within its jurisdiction, particularly when federal constitutional questions of impairment of the obligation of contracts and due process of law were presented to it, constitutes a denial of the equal protection of the laws and of due process of law.

The individual petitioners are owners of houses and lots in Maplewood, N. J., abutting upon the tract of land now in question, a triangular portion of Maplecrest Park, bounded by Tuscan Road, Tuscan Street, Springfield Avenue and Vermont Street. The tract was acquired in 1912 by the respondent Township of Maplewood (then called the Township of South Orange) by warranty deed (Exh. P-4, R. 134) restricting its use to a public park exclusively and has always been used and maintained for that purpose. The deed provides (at R. 135): "This conveyance is made and accepted upon the express covenant that the premises herein mentioned and described are to be used only for the purpose of a Public Park,

and for no other purpose." Moreover the respondent Maplewood conceded, at page 22 of its brief in the New Jersey Supreme Court, that "Unquestionably there was a sufficient *dedication* of the land, by the municipality, as a public park and that the prosecutors [petitioners herein] as taxpayers in the municipality may have a standing to question the use of the land for purposes inconsistent with the use to which it was dedicated." The Maplecrest Civic Association, the fifth Prosecutor, consists of approximately 165 property owners and taxpayers in the neighborhood who have banded together to oppose the erection of the barracks in Maplecrest Park.

On April 12, 1946, Chapter 79, page 281, New Jersey Pamphlet Laws of 1946 (New Jersey Statutes Annotated 55:14F-1 to 10) went into effect. The statute is printed as Appendix A. It authorizes municipalities to provide temporary or permanent dwellings for citizens of the State and to manage and maintain the same. It is silent as to and does not exempt municipalities from complying with and abiding by existing local zoning ordinances and building codes, the State Tenement House Law, statutory restrictions on the use of parks, covenants in deeds restricting tracts solely to use as public parks or dedications of tracts as public parks. Thereupon, on July 23, 1946, the Township Committee of Maplewood passed a resolution (R. 34) authorizing the providing of temporary barrack-type dwellings to accommodate up to 18 families and the financing thereof. At the same time and place the Township Committee adopted another resolution (R. 36) appropriating money and authorizing the execution of a contract (R. 39) with the Federal Public Housing Authority, hereinafter referred to as FPHA. On July 25, Maplewood, pursuant to the latter resolution, actually entered into the contract with the FPHA for the erection and maintenance of six three-family converted Army barracks. The resolutions and contract are silent as to the tract to be used but it is conceded by respondents that the tract

in question was intended. On August 21, petitioners obtained a Rule to Show Cause (R. 13) based upon comprehensive factual affidavits (R. 16 to 62). The Rule was made returnable before the Supreme Court of New Jersey on October 1 and directed the defendants to show cause why a writ of *certiorari* should not issue to review the legality of the aforementioned two July 23 resolutions and the action of Maplewood in entering into the contract of July 25. The Rule also restrained, pending further orders, Maplewood and its officials from undertaking any action or activities pursuant to the aforementioned resolutions and contract. The allowance of the Rule and restraint were pursuant to R. S. 2:81-4; N. J. S. A. 2:81-4. The FPHA, as a party in interest, was made a defendant, but no relief was sought against it. Thereafter, by consent, the restraint was modified to cover only the triangular portion of Maplecrest Park in question (see footnote at R. 15). The triangular tract is circled in red on Exhibit P-2 (R. 133). Maplewood has thus been free to erect barracks and other emergency housing *anywhere* except in the small tract in question.

Under the New Jersey practice, the factual affidavits (R. 16 to 62) presented upon the application for the Rule to Show Cause expired upon the allowance of the Rule and therefore depositions (R. 63 to 147) were taken. Likewise, no formal pleadings are used in applying for a Writ of *Certiorari*. See 1 Bradner, New Jersey Law Practice, 501, §534. Thus, the application for the writ was brought before the New Jersey Supreme Court as a matter of original jurisdiction merely by a Rule to Show Cause why a Writ should not be allowed. It was not proper to file any formal pleading alleging legal grounds for the relief sought. *If* and *after* a Writ of *Certiorari* is allowed, a "Return" thereto is made within twenty days (New Jersey Supreme Court Rule 170). Within ten days after the "Return" is filed, the prosecutor (plaintiff) in *certiorari* must file his "Reasons for Re-

versal", setting forth the grounds upon which he will rely at the hearing and he is *limited* to those reasons (R. S. 2:81-5; New Jersey Supreme Court Rule 165; Bradner, New Jersey Law Practice, 508, §540). The "Reasons for Reversal" is the *first pleading* under New Jersey *certiorari* practice in which the federal constitutional grounds could be set forth. Since no Writ of *Certiorari* had been allowed, and we were before the New Jersey Supreme Court on a Rule to Show Cause why a Writ of Certiorari should not be allowed (the *only pleading* before the court), the federal constitutional grounds could be urged nowhere but in our briefs. Accordingly, under New Jersey practice, petitioners were required to state the grounds for relief in their brief, and, as shall presently appear, proper federal constitutional grounds were advanced. See further discussion of this at page 13, *infra*.

In our 81 page *main* brief in the New Jersey Supreme Court, we urged the following "*State*" grounds for the invalidity of the action of Maplewood:

> (a) The three family buildings proposed to be erected would violate the municipality's own zoning ordinance, the area being zoned for one-family, single, detached houses; would violate the municipality's own building code; and would violate the State Tenement House Law, which applies to three family dwellings; and Chapter 79 of the Laws of 1946 does not eliminate the necessity for complying with these local and State Laws.
>
> (b) Chapter 79 of the Laws of 1946 is unconstitutional, in whole or in part, due to a defective title. (Article 4, section VII, paragraph 4, of the *New Jersey* Constitution requires that "every law shall embrace but one object and that shall be expressed in its title.") The title does not express any authority for municipalities to make appropriations, while the Act goes beyond the scope of the title by attempting to

authorize such appropriations. Likewise, if the Act were to constitute an implied repealer of local zoning ordinances and building codes and of the State Tenement House Law, such a construction would extend the Act far beyond the scope of its title and render it unconstitutional.

(c) The contract between Maplewood and the FPHA obligates the municipality to save harmless and become security for the FPHA and private building contractors, to waive certain license fees that such contractors would normally pay the municipality and to waive certain taxes and expenses that normally would be collectible and thus violates the New Jersey constitutional prohibitions (Article 1, paragraphs 19 and 20) against municipalities giving or loaning their lands, money or credit to an individual, society, association or corporation.

(d) The contract between Maplewood and the FPHA waives certain taxes, purports to specify the amounts of other taxes, and delegates to the FPHA the final decision as to the amounts of still other taxes, and thus violates the New Jersey constitutional requirement (Article 4, section 7, paragraph 12) that property be assessed for taxes under general laws and by uniform rules according to its true value.

(e) The action of the Township in selecting the site in question is illegal, unreasonable, arbitrary, discriminatory and capricious, in that it ignored a restrictive covenant in its deed and there are many other locations far better fitted for the proposed erection of the barracks and which would not adversely affect the value and use of nearby properties.

Our federal constitutional grounds were raised in connection with the following point quoted from our main brief:

"The buildings proposed to be erected would violate a restriction in the deed to the Township, covering the park area in question, as the deed specifically provides that: 'This conveyance is made and accepted upon the express covenant that the premises herein mentioned and described are to be used only for the purpose of a Public Park, and for no other purpose.' Thus, the proposed action would also convert a public park to non-park uses, contrary to law."

After establishing the New Jersey law on this point (it is also discussed in the brief annexed to this petition, under "Point A" of the "Argument"), we concluded in our brief that to permit the park's use for non-park purposes would impair the obligation of contracts.

In an effort to meet the legal objections raised by these points above, the municipality appealed to the Governor for the enactment of remedial legislation, and, accordingly, on September 31, the night before the matter was to be argued in the New Jersey Supreme Court, the New Jersey Legislature, in special session, passed Chapter 321 of the Laws of 1946 (Appendix B). The new law purported to amend Chapter 79 of the Laws of 1946 (Appendix A) so as to correct *one* (but not all) of the defects in its title; to exempt emergency housing from the requirement of complying with municipal zoning ordinances and building codes and with the State Tenement House Law; and to authorize the use of "any lands of such municipality held by it for park or other public use." We therefore supplemented our arguments to include the new statute and filed a 20-page Supplementary Brief pointing out that Chapter 321 was prospective in operation only and did not cure the defective procedures and resolutions under attack; that the title of Chapter 79 was still defective, and that (we quote):

a. "Chapter 321 does not eliminate the necessity for complying with existing state laws governing

changes in use of park lands and does not and *cannot* purport to authorize such use in the case at bar where private rights, which the Legislature cannot constitutionally cut off, have arisen by virtue of the restrictive covenant in the deed, the dedication for park purposes, and the actions in reliance thereon by abutting private owners."

b. "The asserted emergency does not permit the exercise of the police power to violate constitutional guarantees."

At page 6 of our Supplementary Brief, we stated:

"Use of Maplecrest Park for barracks would impair the obligation of contracts, deprive Prosecutors [petitioners herein] of remedies for enforcement existing when the contracts were made and deprive Prosecutors of their property without due process of law. These are fundamental constitutional guarantees. The asserted emergency cannot be utilized as an excuse to violate these constitutional guarantees."

Thereupon, we discussed various state and federal cases (which are discussed at some length in the brief annexed to this petition) to support the conclusion, at page 11 of our brief, that:

"Thus, the emergency asserted in the case at bar does not warrant overriding the constitutional limits of due process of law and non-impairment of contract and remedy, which are fundamental principles of our law."

On October 14, 1946, the New Jersey Supreme Court filed a very short opinion (R. 155) in which it determined that it would not decide the "many interesting questions"

presented to it but would "withhold a determination of the merits and dismiss the rule" to show cause (which contained a restraint and was the *only* pleading before the court) "but without prejudice to its subsequent renewal if, after the [housing] emergency has passed, the temporary structures are not removed." This refusal to decide the merits of a properly presented case or controversy is unique in the annals of our jurisprudence. A refusal to grant a writ of certiorari is, under the New Jersey practice, not a matter of right but purely discretionary. The refusal of such a writ by the New Jersey Supreme Court may not be judicially reviewed by the Court of Errors and Appeals. In the case at bar, the New Jersey court went a step further. It did not even deny the writ of *certiorari*, but merely lifted the restraint and left matters as they were. The anomalies of the New Jersey certiorari practice were recently pointed out by the United States Supreme Court in *Hillsborough Township* v. *Cromwell* (decided January 28, 1946), 326 U. S. 620, 90 L. Ed. (Adv. Op.) 298 at 302, where Mr. Justice Douglas said that it was speculative whether the New Jersey *certiorari* procedure afforded full protection to federal rights.

At page 302 of 90 L. Ed. (Adv. Op.) he said:

> "The allowance of that writ [certiorari], however, is not a matter of right, but purely discretionary. *Staubach* v. *Cities Serv. Oil Co.* 130 NJL 157, 31 A2d 804. And the refusal of a writ of certiorari by the Supreme Court may not be judicially reviewed by the Court of Errors and Appeals." *Post* v. *Anderson*, 111 NJL 303, 168 A 622; *Staubach* v. *Cities Serv. Oil Co., supra.*"

Just before the above quoted language he said:

> "• • • there is such uncertainty concerning the New Jersey remedy as to make it speculative (*Wal-*

lace v. *Hines,* 253 U. S. 66, 68, 64 L. ed. 782, 40 S. Ct. 435) whether the State affords full protection to the federal rights."

On the same page, this court continued:

"Accordingly, we conclude that there is such uncertainty surrounding the adequacy of the state remedy as to justify the [United States] District Court in retaining jurisdiction of the cause."

Similar language appears at page 304 of the Advance Opinion text.

Since federal rights are involved, but were not adjudicated, in the case at bar, we applied to the New Jersey Supreme Court for a stay until the United States Supreme Court could dispose of the case. The application came before the New Jersey Supreme Court by Notice of Motion (R. 150) and factual Affidavit (R. 151), pointing out that we had asserted before the Court that the proposed use of the park tract would violate the federal constitutional guarantees that "no state shall * * * pass any * * * law impairing the obligation of contracts" (Article I, Sec. 10) and that "no state shall deprive any person of life, liberty, or property without due process of law" (Amendment XIV, Sec. 1) and also that the failure of the Court to decide the issues further violated the Constitution by depriving petitioners of property without due process of law and denying to them "the equal protection of the laws", in violation of Sec. 1 of the Fourteenth Amendment. At the argument of this motion, Mr. Justice Bodine, who was presiding and who had written the court's opinion, stated:

"If this case had been decided on its merits, *I would have ruled in favor of Mr. Unger* [attorney for the petitioners]. He has a perfect right to ask the United States Supreme Court whether we are justi-

fied in *suspending* [emphasis ours] the Constitution temporarily during an emergency."

The Newark Evening News of Thursday, October 24, 1946, reported the incident as follows:

> "In denying a request of township counsel for residents to pay court costs, Justice Bodine stated that if the case were decided on its merits the court would have ruled in favor of the residents. Bodine added that Adrian Unger, residents' counsel, could ask the federal court whether the state court had the right to suspend the state constitution during an emergency."

Unfortunately, the New Jersey Supreme Court has no reporter in attendance and we have no official record of these remarks. However, they are of sufficient importance to warrant our bringing them to the attention of this Court. Accordingly, this matter also involves a very unique question of whether a State Court can "suspend" the United States Constitution temporarily during an "emergency."

B

Basis of Jurisdiction

1. The jurisdiction of this Court is sustained by §237(b), as amended, of the Judicial Code; 28 U. S. C., §344(b).

2. The statutes of New Jersey whose validity is involved are:

a. Chapter 79, page 281, of the Pamphlet Laws of 1946; N. J. S. A. 55:14F-1 to 10 (Appendix A), and

b. Chapter 321 of the Pamphlet Laws of 1946 (not yet officially allocated or paged) (Appendix B).

Also involved are *two* resolutions of the Township of Maplewood, both passed July 23, 1946 (R. 34 and 36) and a contract between Maplewood and the FPHA executed on July 25, 1946 (R. 39).

3. The final judgment sought to be reviewed (R. 6) was signed and filed on October 23, 1946, and this petition for *certiorari* was presented within one month thereafter.

4. The nature of the case and the rulings of the New Jersey Supreme Court bring the case within the jurisdictional provisions relied upon in that:

a. There is a final judgment or decree, as it determinates the litigation between the parties and disposes of all the litigation between the parties, even though it did not decide all rights litigated. *Weston* v. *Charleston,* 27 U. S. (2 Pet.) 449, at 464, 7 L. Ed. 481; *Market St. Ry. Co.* v. *Railroad Commission,* 324 U. S. 548, 89 L. Ed. 1171, rehearing denied, 324 U. S. 890, 89 L. Ed. 1438.

b. The decision sought to be reviewed is by the highest court of the state in which a decision could be had, in that no appeal to the Court of Errors and Appeals can be had from the refusal of the New Jersey Supreme Court to grant a Writ of *Certiorari. Hillsborough Township* v. *Cromwell,* 326 U. S. 620, 90 L. Ed. (Adv. Op.) 298, at 302; *Post* v. *Anderson,* 111 N. J. L. 303; *Staubach* v. *Cities Service Oil Co.,* 130 N. J. L. 157. (See discussion of facts under Point A, *supra.*)

c. The judgment or decree was rendered in a suit involving a case or controversy. *Certiorari* in New Jersey is a Prerogative writ. See 1 Bradner, New

Jersey Law Practice, 491, §528, and *Weston* v. *Charleston, supra.*

d. The case presents substantial federal questions. (See paragraph 5, *infra.*)

e. The federal questions sought to be reviewed were properly raised and preserved in the state court, to the extent permitted by local practice. See discussion of this under Point A, *supra*, at page 4. Moreover, the state practice must give the litigant "a reasonable opportunity to have the issue as to the claimed [federal] right heard and determined". *Central Union Telephone Co.* v. *Edwardsville,* 269 U. S. 190, 194, 195, 70 L. Ed. 229. If the federal question is raised at the first opportunity, even though too late for consideration under the state practice, it is deemed raised in time, especially when the decision itself raises new federal issues, not reasonably to be anticipated. *Saunders* v. *Shaw,* 244 U. S. 317, 320, 61 L. Ed. 1163; *Ohio* v. *Akron,* 281 U. S. 74, 79, 74 L. Ed. 710, 66 A. L. R. 1460; *Missouri* v. *Gehner,* 281 U. S. 313, 320, 74 L. Ed. 870. See the statement and cases cited in Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States,* page 126, section 74, to the effect that, if the first and only opportunity to raise a federal claim in a state court is in a brief, that is sufficient, and that the formal requirements should be deemed to be satisfied by the raising of the federal question in the state court briefs in such cases, as well as in cases where the local practice in the state renders it impossible to place the federal question on the record in the strict sense and permits it to be raised only by briefs of counsel.

f. The decision of the New Jersey Supreme Court does not rest upon any state ground which independently and adequately supports the judgment or

decree. The *only* ground asserted by the court below was the "emergency", which shall be shown in our brief, *infra*, at page 26, not to be an adequate state ground.

g. This Court has jurisdiction to review the matter under the statutory provisions cited above in that there is "drawn in question the validity of a statute of [a] State on the ground of its being repugnant to the constitution * * * of the United States," and on the further ground that a "title, right, privilege, or immunity, is specially set up and claimed * * * under the constitution * * * of * * * the United States." The reference to a State "statute" also includes municipal resolutions. The statutes, resolutions and contract in question are cited under Point B, paragraph 2, *supra*.

5. The questions involved are substantial in that:

a. The essence of the controversy is whether a public park can be used by governmental authorities for temporary housing in violation of a restrictive covenant in the deed limiting its use to a public park or in violation of a dedication to use as a public park. *This is of great public interest at the present time.*

b. The refusal of the New Jersey Supreme Court to decide properly presented federal questions or the merits of a case or controversy seems to be of novel impression and denies petitioners the equal protection of the laws and deprives them of property without due process of law.

c. The position of the New Jersey Supreme Court that the federal constitution can be suspended temporarily in an emergency is contrary to established law.

d. The refusal of the New Jersey Supreme Court to decide the merits of the controversy permits respondents to deprive petitioners of property without due process of law and to impair the obligation of contract.

e. A decision by the New Jersey Supreme Court on the merits would result in a decision in favor of the petitioners because the law of New Jersey is settled on this matter and because the New Jersey Supreme Court has admitted that it would so decide the matter.

6. Petitioners seek a review of a judgment of the New Jersey Supreme Court which is the court of first instance in *certiorari* matters and is also the court of last resort when *certiorari* is denied. The federal questions sought to be reviewed were raised in the briefs and in an affidavit (R. 151) presented to the Court. The New Jersey practice does not authorize the use of a formal pleading, setting forth the grounds relied upon, until *after* the writ is allowed and a "Return" thereto is made. In addition, the decision of the New Jersey Supreme Court in and of itself established additional constitutional grounds of review by depriving petitioners of their property without due process of law and denying them the equal protection of the laws. (The method of raising the federal questions and what was presented is discussed under Point A, *supra*, and in our brief, *infra*.)

7. The federal questions sought to be reviewed were presented to but not passed upon in any way by the New Jersey Supreme Court, but it recognized and commented on their existence upon our application for a stay pending appeal to this Court. (See Point A, *supra*.)

C

The Questions Presented

The questions presented are:

1. Can a public park be used by governmental authorities for *temporary* housing in violation of a restrictive covenant in a deed and a dedication to park purposes?

2. Does the refusal of the New Jersey Supreme Court to decide properly presented federal constitutional questions or to decide the merits of the controversy violate the United States Constitution by

a. denying petitioners the equal protection of the laws or

b. depriving them of property without due process of law, or

c. permitting respondents to deprive petitioners of property without due process of law, or

d. permitting respondents to impair the obligation of contracts?

3. Do Chapters 79 and 321 of the New Jersey Laws of 1946, the two July 23, 1946 resolutions of the Township of Maplewood, the July 25, 1946 contract between the Township of Maplewood and the FPHA, or one or more of the foregoing, violate the United States Constitution by:

a. depriving petitioners of their property without due process of law, or

b. impairing the obligation of contracts?

4. Can rights guaranteed by the United States Constitution be "suspended" temporarily in an asserted emergency?

D

Reasons Relied Upon for the Allowance of the Writ

The following reasons are relied upon for the allowance of the writ of certiorari:

1. The denial of relief by the New Jersey Supreme Court has the effect of holding that a public park can be used by government authorities for temporary housing, even though such use is forbidden by a restrictive covenant in the deed or by the dedication to park purposes, and that the due process of law and non-impairment of the obligation of contract guarantees of the federal constitution afford no protection in such a situation. This presents a federal question of substance not heretofore determined by this Court and is not in accord with applicable decisions of this Court.

2. The New Jersey Supreme Court has refused to decide important federal questions of constitutional rights presented to it.

3. The New Jersey Supreme Court has refused to decide important questions of local law although it admits that, if it were to decide these questions, petitioners would prevail.

4. This refusal of the New Jersey Supreme Court to decide federal constitutional rights and questions presented to it also results in the denial to the petitioners of their constitutional rights and, *ipso facto*, further denies them the equal protection of the laws and deprives them of property without due process of law.

5. The New Jersey Supreme Court has so far departed from the accepted and usual course of judicial

proceedings as to call for the exercise of this Court of last resort's power and supervision and control over the processes of justice.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the New Jersey Supreme Court, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of proceedings, and the case numbered and entitled on its docket, "No. 235, October Term, 1946, Edward Schwarz, Jeremiah Lott, Joseph K. Brown, Dorothy O. Hamstra and Maplecrest Civic Association, Prosecutors v. Township Committee of Maplewood, New Jersey, Building Inspector of Maplewood, New Jersey, and the Federal Public Housing Authority, Defendants," and that the said judgment of the New Jersey Supreme Court may be reversed by this Honorable Court, or that this Honorable Court direct the New Jersey Supreme Court to decide the matter on its merits, or that this Honorable Court direct the New Jersey Supreme Court to decide the federal constitutional grounds asserted by your petitioners, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

EDWARD SCHWARZ,
JEREMIAH LOTT,
JOSEPH K. BROWN,
DOROTHY O. HAMSTRA, and
MAPLECREST CIVIC ASSOCIATION.

By

MILTON M. and ADRIAN M. UNGER,
Counsel for Petitioners.

ADRIAN M. UNGER,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1946

EDWARD SCHWARZ, JEREMIAH LOTT, JOSEPH K. BROWN, DOROTHY O. HAMSTRA and MAPLECREST CIVIC ASSOCIATION,
Petitioners,

v.

TOWNSHIP COMMITTEE OF MAPLEWOOD, NEW JERSEY, BUILDING INSPECTOR OF MAPLEWOOD, NEW JERSEY, and the FEDERAL PUBLIC HOUSING AUTHORITY,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

The Opinion of the Court Below

The opinion of the New Jersey Supreme Court (R. 155) is not reported and will not be reported, either officially or unofficially, because the opinion directs that it is "Not for print in any report." The opinion was filed by the Court on October 14, 1946.

II

Jurisdiction and Statement of the Case

The jurisdictional basis for the petition and the statement of the case are found in the petition and for the sake of brevity are not repeated here.

III

Specification of Errors

1. The Supreme Court of New Jersey erred in (apparently) holding that a public park can be used by governmental authorities for temporary housing in violation of a restrictive covenant in a deed limiting its use to park purposes and a dedication to park purposes only.

2. The Supreme Court of New Jersey erred in refusing to decide properly presented federal constitutional questions or the merits of a properly presented controversy and thus denied petitioners the equal protection of the laws and deprived them of property without due process of law.

3. The Supreme Court of New Jersey erred in holding that a so-called "emergency" justified "suspending" the constitution temporarily and thus depriving petitioners of their property without due process of law and impairing the obligation of contracts in which petitioners had a legal interest.

4. The Supreme Court of New Jersey erred in not declaring Chapters 79 and 321 of the New Jersey Laws of 1946, the two July 23, 1946 resolutions of the Township of Maplewood, the July 25, 1946 contract between Maplewood and the FPHA and the various actions of officials of Maplewood, or any of the foregoing, unconstitutional (in violation of the "due process", "equal protection", and "obligation of contract" clauses) and *ultra vires* insofar as they operated or acted to permit the use of the triangular portion of Maplecrest Park in question for temporary housing.

IV

Argument

POINT A

Chapters 79 and 321 of the New Jersey Laws of 1946, the two July 23, 1946 Resolutions of Maplewood, the contract between Maplewood and the FPHA, and the actions of the officials of Maplewood, or any of the foregoing, violate the United States Constitution in that, by authorizing the use of Maplecrest Park for housing, they impair the obligation of a contract in which petitioners have a legal interest.

In our petition for *certiorari* we pointed out that we had argued in the New Jersey Supreme Court that "the buildings proposed to be erected would violate a restriction in the deed to the township, covering the park area in question, as the deed specifically provides that 'this conveyance is made and accepted upon the express covenant that the premises herein mentioned and described are to be used only for the purpose of a Public Park, and for no other purpose'. Thus, the proposed action would also convert a public park to non-park uses, contrary to law."

We also pointed out that the respondent Maplewood conceded that there was also a dedication of the tract as a *public park.*

The deed to the respondent Maplewood (therein called South Orange, its former name) is Exhibit P-4, printed at Record 134. It is fundamental that the acceptance by the respondent Maplewood of the deed binds Maplewood to the performance of the covenant in the deed as effectually as if it had executed the instrument. The acceptance

of the deed implies a promise on the part of the grantee to perform the covenants to be performed on its part. See *Finley* v. *Simpson,* 22 N. J. L. 311 (N. J. Sup. Ct., 1850); *Hagerty* v. *Lee,* 54 N. J. L. 580, at page 584 (N. J. Ct. of E. & A., 1892); 14 Am. Jur. 483, title "Covenants, Conditions and Restrictions," sec. 4, and same text, page 611, sec. 196.

It is not subject to question and was not denied by the New Jersey Supreme Court in the case at bar that owners of lots abutting upon and surrounding a tract which has been conveyed to a municipality by a deed which restricts the use of the tract to a public park, or which has been dedicated as a public park cannot be converted to another use as against the interests of the surrounding land owners (save by eminent domain) and that even the Legislature cannot impair the rights of the surrounding land owners. The cases to this effect were thoroughly briefed and argued before the New Jersey Supreme Court. A leading case on the subject is *Fessler* v. *Town of Union,* 67 N. J. Eq. 14 (Chanc., 1904), affirmed *per curiam* on the opinion below, in 68 N. J. Eq. 657 (Errors and Appeals, 1904), wherein a town was enjoined from constructing a bell tower on an open area which had been dedicated to the public as a public square, the Court holding that the complainant, owner of lots bordering on the square, had a private right, over and above that of the public at large, to have the square kept open, and that even the Legislature had no power to alter or extend the dedication as against one owning lots bordering on the public square and purchasing the lots with reference thereto. See particularly the language of Vice Chancellor Pitney at pages 23 to 27 of the lower Court's opinion, particularly his references to *Price* v. *Inhabitants of Plainfield,* 40 N. J. L. 608, at 613 (Errors and Appeals, 1878), and *Bayonne* v. *Ford,* 43 N. J. L. 296 (Supreme, 1881).

Barr v. *Belmar,* 116 N. J. Eq. 466 (Chan., 1934), modified as to counsel fees only, but affirmed in other respects, in 118 N. J. Eq. 279 (Errors and Appeals, 1935), held that even statutes which empower a municipality to devote parks owned by it to purposes other than those for which the lands were dedicated "do not purport to authorize a municipality to invade the domain of private right and it is clear that they did not and could not do so." See also *Strock* v. *Mayor, &c. of East Orange,* 80 N. J. L. 619 (Supreme Court, 1910), to the effect that neither the municipality nor the Legislature can authorize a municipality to divert to other purposes lands which have been dedicated to park purposes, without first exercising the right of eminent domain. *Bozarth* v. *Egg Harbor City,* 89 N. J. Eq. 26 (Chan., 1918), held that one purchasing lands with reference to a plat designating a certain area as a park has a private interest in the park, in the nature of an easement, and the Legislature has no power to authorize the municipality to convert the park to commercial use. At page 36, the Court said that "where private rights exist in the nature of an easement, touching the use of the land by the owner of the fee, it is obvious that no Legislative power can disturb such rights. It is such a private property right that a complainant herein asserts, and that our *constitution protects.*"

In *Hill* v. *Belmar,* 3 N. J. Misc. 254 (Supreme, 1925), an ordinance authorizing the erection of a swimming pool on lands dedicated as a public park was set aside by the New Jersey Supreme Court on *certiorari* on the ground that the proposed new use would infringe upon the private rights of abutting land owners who had purchased their lands on the representation that the park would be kept open. In *Trustees of the M. E. Church* v. *Mayor, &c., of Hoboken,* 19 N. J. Eq. 355 (Chan., 1868), a tract of land, which had been laid out and dedicated to the public as a public square, was sold to the complainant

church organization which erected a church thereon. In denying an injunction to restrain the defendant city from taking possession of the tract, Chancellor Zabriskie pointed out that *even the Legislature* cannot impair the rights of surrounding owners to have the square kept open as a public square. He pointed out at page 356 that "the Legislature may have the right, so far as the public is concerned, to annul the dedication and yield up the right of the public, but they have no power, if the owners of the surrounding lots have the right as appurtenant to their lots to have this square kept open as a public square, to permit its occupation as against them."

In *Baird* v. *Board, &c., South Orange,* 108 N. J. Eq. 91 (Chan., 1931), reversed on other grounds, not pertinent here, in 110 N. J. Eq. 603 (Errors and Appeals, 1932), Vice Chancellor Church said, at page 101, that the Legislature "cannot, however, change the use to which land is restricted in a deed of conveyance to a municipality. Nor can the municipality do so." See the array of authorities collected at pages 101 to 110 of the lower Court's opinion, all to the effect that *neither the Legislature nor the municipality* (except by eminent domain) can cut off contractual or private vested rights, if it seeks to change the use to which land is restricted in a deed of conveyance to a municipality.

The New Jersey rule is likewise the federal rule. See *Davenport* v. *Buffington* (C. C. A., 8th), 97 Fed. 234, 46 L. R. A. 377, holding that a nearby landowner is one of the *cestuis que use* for whom a park, dedicated to the use of the people is held in trust, and that a municipality which dedicates land to public use is estopped from revoking that dedication or using the park for other purposes as against the interest of taxpayers who have settled in the vicinity of the park in reliance upon the grant and covenant which the dedication evidences.

In the leading case of *Cincinnati* v. *White*, 6 Pet. (U. S.) 431, 8 L. Ed. 452, where the original proprietors of land set it apart as a common for the use and benefit of the town forever, this court remarked that such dedication doubtless greatly enhanced the value of the private property adjoining this common, and after being thus set apart for public use and enjoyed as such, and private and individual rights having been acquired with reference to it, the law considered it in the nature of an estoppel in pais, which precluded the original owner from revoking such dedication. Such a revocation would constitute a violation of good faith to the public, and to those who had acquired private property with a view to the enjoyment of the use thus publicly granted.

See also *Quinn* v. *Dougherty* (C. C. A., Dist. of Col.), 30 Fed. (2d) 749, at 751.

We pointed out under Point A of our petition for *certiorari* that we had argued, in both our main and supplemental briefs, that for the Legislature or municipality to use the tract in question contrary to the restrictions in the deed and the dedication, would impair the obligation of contracts and thus deprive petitioners of their constitutional rights. The New Jersey Constitution, Article IV, Sec. VII, paragraph 3, also contains a prohibition against impairing the obligation of contracts, stating "the Legislature shall not pass any * * * law impairing the obligation of contracts. * * *"

It is fundamental that a State, by the act of its legislature, cannot alter the nature and legal effect of an existing contract—and a deed is a contract—to the prejudice of either party. This Court has often emphasized the importance of protecting the obligation of contracts from all legislative action tending to their impairment. In *Murray* v. *Charleston*, 96 U. S. 449, 24 L. Ed. 760, this Court stated that the inviolability of contracts and the duty of performing them, as made, are at the foundation of all well-ordered society, that to prevent the removal

or disturbance of these foundations was one of the great objects for which the Constitution was framed, and that it was one of the highest duties of this Court to take care that the prohibition should neither be evaded nor frittered away. In *Northern Pacific Railroad Co.* v. *Minnesota,* 208 U. S. 583, 52 L. Ed. 630, this Court pointed out that legislation, state or municipal, which deprives one of the benefit of a contract necessarily impairs the obligation of the contract; and when a state Court gives effect to subsequent state or municipal legislation which impairs contract rights by depriving beneficially interested parties of their benefits, a case is presented for the jurisdiction of this Court. Moreover, the obligations of a contract are impaired by a law which renders them invalid, releases or extinguishes them, or derogates from substantial contractual rights. *Home B. & L. Assn.* v. *Blaisdell,* 290 U. S. 398, 78 L. Ed. 413, 88 A. L. R. 14, 81. Likewise, the obligation of a contract is impaired by a statute or municipal resolution or contract which dispenses with conditions (*Columbia R. Gas & Electric Co.* v. *South Carolina,* 261 U. S. 236, 67 L. Ed. 629; *Murray* v. *Charleston, supra; Cleveland, P. & A. R. R. Co.* v. *Pennsylvania,* 15 Wall. [U. S.] 300, 21 L. Ed. 179; *Green* v. *Biddle,* 8 Wheat. [U. S.] 1, 5 L. Ed. 547) or releases or lessens any part of the contract obligations (*Sturges* v. *Crowninshield,* 4 Wheat. [U. S.] 122, 4 L. Ed. 529).

The constitutional provision that no state shall pass any law impairing the obligation of contracts applies as well to municipal ordinances and resolutions which have the effect of law. *Vicksburg* v. *Vicksburg Waterworks Co.,* 202 U. S. 453, 50 L. Ed. 1102. Consequently, authorities cited by us are equally applicable to the New Jersey legislation under attack and the resolutions and contract of the respondent Maplewood.

Respondents cannot urge that the "temporary" impairment of the obligation of the contract, for approximately five years, justifies temporary "suspension" of

the constitution and the use of the park land in violation of the restrictive covenant in the deed and the dedication of the tract. The Constitution cannot be "suspended" temporarily. Since the constitutional prohibition as to the impairment of the obligation of contracts is absolute, the amount, duration and extent of the impairment is immaterial. An act which in any degree, no matter how slightly, modifies the obligation of a contract, by attempting to relieve one party from any duty under the contract, is repugnant to the constitutional prohibition against impairment of the obligation of contracts. *Minden* v. *Clement,* 256 U. S. 126, 65 L. Ed. 857; *Hendrickson* v. *Apperson,* 245 U. S. 105, 62 L. Ed. 178; *Farrington* v. *Tennessee,* 95 U. S. 679, 24 L. Ed. 558; *Von Hoffman* v. *Quincy,* 4 Wall. (U. S.) 535, 18 L. Ed. 403; *Planters' Bank* v. *Sharp,* 6 How. (U. S.) 301, 12 L. Ed. 447.

Likewise, the rights of due process of law and equal protection of the laws, as well as non-impairment of the obligation of contracts, guaranteed by the United States Constitution, cannot be "suspended" temporarily in an asserted emergency. It is quite true that, under certain circumstances, the constitutional protection of the obligation of contracts is necessarily subject to the police power of the state. However, the means adopted must be reasonable, must not be arbitrary or oppressive, and the necessity must be apparent. *Triegle* v. *Acme Homestead Ass'n,* 297 U. S. 189, 80 L. Ed. 575, 101 A. L. R. 1284, rehearing denied in 297 U. S. 728, 80 L. Ed. 1010. In the first place, the New Jersey Supreme Court, under the New Jersey cases, could not predicate its action on the emergency. It did not expressly deny a writ of *certiorari;* it merely withheld a decision on the merits, refused to decide the "many interesting questions" presented to it, and lifted the restraint. If it had decided the case on the merits, it would have ruled in our favor. It so admitted (see Point A of our Petition for Certiorari, *supra*). Under the New Jersey rule, an asserted emer-

gency cannot be used as an excuse to violate a constitutional prohibition or guarantee. The New Jersey Supreme Court and the New Jersey Court of Errors and Appeals had already so held and the case at bar did not dissent from that rule. It was first established by *Koch* v. *Essex County Board of Taxation,* 97 N. J. L. 61 (Supreme Court, 1922), which is very pertinent to the case at bar and involved the housing shortage arising after World War I. In 1920 the New Jersey Legislature passed an act designed to accord a tax exemption for a period of five years to properties built during the two years following the passage of the act. The act was held unconstitutional, notwithstanding the recital of the emergency, on the ground that it was special in character, created an arbitrary classification of property to be exempted from taxation, and did not conform to the state constitutional requirement of uniformity of assessment. The Supreme Court summarily rejected the argument that the act would relieve a "pressing emergency" pointing out at page 66 that "*a pressing emergency is no ground for violation of a constitutional provision, otherwise the Legislature might constantly violate the constitution upon the ground of some emergency, as an exercise of the police power, but the exercise of such power, if it exists, must be within the constitutional limit.*" The following year the Court of Errors and Appeals decided *Braunstein* v. *Jersey City,* 98 N. J. L. 478 (Errors and Appeals, 1923), which involved the same statute. Mr. Justice Parker pointed out, at page 479, that the *Koch* case "is precisely in point" and continued by affirming the doctrine of the *Koch* case, discarding the arguments of "emergency" and "police power" alluded to therein and again specifically emphasizing that a "pressing emergency is no ground for violation of a constitutional provision, and that the 'police power' broad as it is, cannot be exercised in defiance of constitutional limits."

The *Koch* and *Braunstein* cases stand unreversed as the law of New Jersey. Thus, the police power of New Jersey cannot violate the constitutional guarantees of both the federal and state constitutions against impairment of contracts. The New Jersey doctrine that asserted emergencies do not warrant ignoring constitutional guarantees was also well expressed by the United States Supreme Court in the NRA case, *Schechter* v. *United States,* 295 U. S. 495, 79 L. Ed. 1570, wherein (at p. 528 of 295 U. S.) Chief Justice Hughes, speaking for the unanimous Court, said:

> "We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. *But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power.* The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but *these powers* of the national government *are limited by the constitutional grants.* Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary."

Moreover, police power to be exercised by the state itself is not involved. Maplewood had contracted, by the deed, to use the tract *only* as a public park. It also had so dedicated the tract. Chapters 79 and 321 of the Laws of 1946 are only *permissive* legislation, permitting a municipality to engage in emergency housing activities. The State did not exercise its police power. It merely

permitted municipalities to do certain things. Under these circumstances, Maplewood cannot abrogate its own solemn covenant and declare a nullity its agreement to use the tract only as a park. Moreover, the means employed were not reasonable nor the necessity apparent. There are many other tracts in Maplewood as well or better fitted for emergency housing. See Record 99 to 113. This was thoroughly argued in our brief in the New Jersey Supreme Court and need not be presented here. The New Jersey Supreme Court's opinion recited that there is a housing shortage. True! But it did not—and could not —say that there was a shortage of *space* for housing in Maplewood. Since the record discloses many other tracts are available for housing in Maplewood, it cannot be said that there was any *necessity* for using the tract in question.

Thus, the emergency asserted in the case at bar does not warrant overriding the constitutional limits of due process of law and non-impairment of contract which are fundamental principles of law. Accordingly, Chapters 79 and 321 of the Laws of 1946 and the municipal resolutions and contract cannot constitutionally authorize the use of park lands as against private rights arising by means of a restrictive covenant in the deed conveying the property to the municipality or arising from the dedication of the property as a public park.

POINT B

The refusal of the New Jersey Supreme Court to decide properly presented federal constitutional questions or to decide the merits of the controversy violates the United States Constitution by denying petitioners the equal protection of the laws and depriving them of property without due process of law.

A Court must determine all questions properly presented, unless it is clothed with authority to decline to exercise jurisdiction. Questions, however delicate in nature and however willingly they might be avoided, must be passed upon by a Court in the conscientious performance of its duty whenever they are properly raised and presented. It cannot refuse to exercise a power with which the constitution and laws have clothed it. In exercising this power, it is the duty of the Court to facilitate and not to retard the determination of litigated causes. See 14 Am. Jur. 277, title "Courts", §48. In *Cohens* v. *Virginia*, 6 Wheat. (U. S.) 264, at 404, 5 L. Ed. 257, at 291, Chief Justice Marshall emphasized this obligation, saying:

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true, that *it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur*

> *which we would gladly avoid, but we cannot avoid them.* All we can do, is to exercise our best judgment, and conscientiously to perform our duty."

And see *Meyer* v. *Tupper,* 1 Black. (U. S.) 522, 17 L. Ed. 180, at 183, where Chief Justice Taney pointed out that "the Court could not, consistently with its duty, refuse to exercise a power with which the Constitution and laws had clothed it, when its aid was invoked by a party who was entitled to demand it as a matter of right".

The refusal of the New Jersey Supreme Court to adjudicate the merits of the case at bar, or to accord petitioners the protection of constitutional guarantees against impairment of the obligation of contract or deprivation of property without due process of law, or to grant the relief which it *concedes* would be proper and forthcoming, violates the Fourteenth Amendment to the United States Constitution which says: "* * * nor shall any state *deprive* any person of * * * *property without due process of law;* nor * * * deny to any person within its jurisdiction the *equal protection of the laws.*" The Court below has advanced no reason for its failure to decide the merits, but we suggest that a decision which might prove unpopular or which the Court "would gladly avoid" is no justification for refusal to enforce federal constitutional rights. It has been repeatedly said that the guaranty of the equal protection of the laws means that no person or class shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances, in their lives, property, liberty and pursuit of happiness. *Barbier* v. *Connolly,* 113 U. S. 27, 28 L. Ed. 923; *Truax* v. *Corrigan,* 257 U. S. 312, 66 L. Ed. 254, 27 A. L. R. 375; *Gardner* v. *Michigan,* 199 U. S. 325, 50 L. Ed. 212; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 46 L. Ed. 679. And this Court has recently said that equal protection of the laws is something more than an abstract right, and is a command which the state must respect, the

benefits of which every person may demand. *Hill* v. *Texas*, 316 U. S. 400, 86 L. Ed. 1559.

Moreover, the inhibitions of the Fourteenth Amendment include all departments of the state government, the *judicial* as well as the political. *Ladner* v. *Siegal Co.*, 298 Pa. 487, 148 Atl. 699, 68 A. L. R. 1172.

We discussed, *supra*, under Point A of our Petition for *Certiorari*, the anomalous New Jersey procedure which permits the New Jersey Supreme Court, as a court of first instance, to also become the court of last resort by denying a writ of *certiorari* to litigants asserting federal constitutional rights. There is no appeal from the denial of such a writ. See also our discussion therein of this Court's criticism, in *Hillsborough* v. *Cromwell*, of the New Jersey procedure as *not* affording "full protection to federal rights." This power of the New Jersey Supreme Court is found in no statute, but is preserved to it by Article I, paragraph 1, of the New Jersey Constitution of 1844, which continued the Court as it had existed theretofore, and Article X, Section 1, of that constitution which provided that the Supreme Court "shall continue with the like powers and jurisdiction as if this Constitution had not been adopted." This has been held to "freeze" the Court's powers as of 1844 and to negate all legislative attempts to provide an appeal from the denial of a writ of *certiorari*. This Court, however, is free to find—and we so urge—that the *certiorari* procedure in New Jersey, by denying litigants asserting federal constitutional rights an opportunity to present formally in any pleading their federal constitutional rights or to appeal from the arbitrary denial of a writ of *certiorari, especially when federal rights are involved,* so limits and restricts their access to the Courts as to deny them the equal protection of the laws and due process of law. Notwithstanding the "freezing", as of 1844, of *certiorari* procedures in New Jersey, Article VI of the United States Constitution, the "supreme law of the land" provision,

furnishes ample authority for holding the New Jersey procedure unconstitutional. Article VI provides that "* * * This Constitution * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the *Constitution* or laws of any State to the contrary notwithstanding." See also 12 Am. Jur. 250, title "Constitutional Law," Sec. 556.

The equal protection clause secures petitioners against intentional or arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution. An actual discrimination arising from the method of administering a law constitutes as much a denial of equality of rights as a discrimination made by law. The validity of a statute under the equal protection clause, therefore, often depends on how it is construed and applied. *Concordia Fire Ins. Co.* v. *Illinois,* 292 U. S. 535, at 545 78 L. Ed. 1411 at 1418. We pointed out in the New Jersey Supreme Court that Chapter 79 was silent as to use of public parks and that Chapter 321, while authorizing their use for municipal housing activities, did not require that they be used when such use was forbidden by a restrictive covenant in the deed or when they had been dedicated to such use. Nevertheless, both Maplewood and the Supreme Court of New Jersey chose to permit the use of the parks in violation of the covenant and dedication. This, of course, constituted intentional arbitrary discrimination in the effectuation of contracts and in the administration of the laws and the processes of justice, resulting in the denial to petitioners of the equal protection of the laws.

The failure of the Court below to adjudicate the merits of the controversy and to accord us protection of certain constitutional guarantees also deprived us of property without due process of law. It is not necessary to discuss due process here at length. See Point C, *infra.* As pointed out in *Truax* v. *Corrigan,* 257 U. S. 312, 66 L. Ed. 254, 27 A. L. R. 375, the equal protection clause and the due

process clause frequently overlap and a violation of one may involve a violation of the other, even though the spheres of protection are not conterminous. Due process also demands equality of treatment in state Courts and equal dispensation of justice. But the *Truax* case, *supra,* emphasizes that the equality demanded by the equal protection clause is not a mere generality or minimum but is specific and more extensive than that demanded by due process.

POINT C

Chapters 79 and 321 of the New Jersey Laws of 1946, the two July 23, 1946 Resolutions of Maplewood, the July 25, 1946 contract between Maplewood and the FPHA, the actions of the officials of Maplewood and the refusal of the New Jersey Supreme Court to decide the properly presented federal constitutional questions and to decide the merits of the controversy, or one or more of the foregoing, deprive petitioners of their property without due process of law.

The Fourteenth Amendment declares that "no state shall * * * deprive any person of life, liberty or property without due process of law." This applies to all departments, legislative, executive and judicial, and all political subdivisions of the state, including the New Jersey Supreme Court and the Township of Maplewood.

We have pointed out that, under the law of New Jersey, *no one,* not even the Legislature, can (save by eminent domain) cut off the private rights acquired by abutting landowners (petitioners here) to have a public park continued for that purpose when it has been conveyed to a municipality on the express condition that the land be used only for that purpose or when it has been

dedicated to that purpose. In the case at bar, there was both a restrictive covenant and a dedication. Due process of law would therefore *demand* that, if the municipality desired to change the use of the park and cut off petitioners' rights, it exercise its right of eminent domain and condemn petitioners' interests. No such action was attempted. It follows that cutting petitioners off from the abutting park and putting barracks there would not only end their use and enjoyment of the park—a property right—but also depreciate the value of petitioners' homes —all without any compensation or compliance with the due processes of law. Moreover, such taking was in direct violation of Article I, paragraph 16, of the New Jersey Constitution which provides: "Private property shall not be taken for public use without just compensation * * *." Such a taking without compensation also violates the due process clause of the Fourteenth Amendment. *Panhandle Eastern Pipe Line Co.* v. *State Highway Comm.*, 294 U. S. 613, 79 L. Ed. 1090, rehearing denied in 295 U. S. 768, 79 L. Ed. 1709; *Consolidated Turnp. Co.* v. *Norfolk & O. V. R. Co.*, 228 U. S. 326, 57 L. Ed. 857; *Appleby* v. *Buffalo*, 221 U. S. 524, 55 L. Ed. 838.

Moreover, supposing — but not admitting — that petitioners had no private rights in the park lands, even then Maplewood did not follow the other procedures required by New Jersey law. Chapter 156, page 353, of the Laws of 1940 (R. S. 40:60-36.1) established a procedure whereby parks conveyed under restrictive covenants—and presumably in which no private interests intervened—might be put to a different use, *after* a public referendum sanctioning the change. Likewise, R. S. 40:60-32, as amended by Chapter 199, page 716, of the Laws of 1944, provides that when a municipality owns lands "dedicated or devoted, wholly or partly, to public use," it may change the use by ordinance if the lands are "unsuited to or undesirable for such public use or otherwise useless, burdensome or disadvantageous to the public." *Neither* of these

necessary procedures has been followed by respondent Maplewood.

We pointed out at page 4 of our Supplementary Brief in the court below that "Chapter 321 does not eliminate the necessity for complying with existing state laws governing changes in use of park lands and does not and cannot purport to authorize such use in the case at bar where private rights, which the Legislature cannot constitutionally cut off, have arisen by virtue of the restrictive covenant in the deed, the dedication for park purposes, and the actions in reliance thereon by abutting private owners."

Paragraph 4 of Chapter 321 of the laws of 1946 (App. A) clearly indicates that Maplewood may not, in any circumstance, use the park tract in question for barracks without following the aforementioned prescribed procedures for changing the use. Paragraph 4 reads as follows:

> "4. Notwithstanding the provisions of any zoning or other municipal ordinance or building code to the contrary, the governing body of any municipality may, in its discretion, provide by resolution for the erection or reconstruction of any portable or temporary or movable dwelling unit or units, whether purchased or acquired from the Federal Government, or from the State Government, or otherwise, in or upon any area within such municipality, including any lands of such municipality held by it for park or other public use."

This sentence purports to permit municipalities to provide by resolution for the erection of barracks on lands held by such municipality for park or other public use, "notwithstanding the provisions of any zoning or other municipal ordinance or building code to the contrary." Had the words "or state law" appeared after the word "code," the procedures established by R. S. 40:60-36.1

and 32 would be inapplicable. However, since the legislature has not authorized any departure from the requirements of these two statutes, the municipality must, in any event, follow the procedures of one of these state laws. Nevertheless, Maplewood has made no effort to comply with any of these necessary elements of due process of law and the New Jersey Supreme Court, although these matters were argued and exhaustively briefed, afforded no protection to this basic constitutional right. It has been said that due process of law means law in the *regular course* of administration through courts of justice according to the rules and forms which have been established for the protection of private rights. *Pennoyer* v. *Neff*, 95 U. S. 714 at 733, 24 L. Ed. 565 at 572; *Barbier* v. *Connolly*, 113 U. S. 27 at 28, 28 L. Ed. 923 at 924; *Endicott-Johnson Corp.* v. *Smith*, 266 U. S. 291, 69 L. Ed. 293; *Turpin* v. *Lemon*, 187 U. S. 31, 47 L. Ed. 70. Surely, the action of Maplewood, in avoiding the normal processes of law, and the action—or non-action—of the New Jersey Supreme Court, in taking no cognizance of these illegal actions were such a departure from normal administrative and judicial processes as to deprive petitioners of property without due process of law and call for the corrective hand of this Court. Due process is a limitation upon arbitrary power and a guaranty against arbitrary legislation. *Nebbia* v. *New York*, 291 U. S. 502, 78 L. Ed. 940, 89 A. L. R. 1469; *Heiner* v. *Donnan*, 285 U. S. 312, 76 L. Ed. 772. Its primary purpose is to secure individuals from the arbitrary exercise of the powers of government, unrestrained by established principles of private rights and of justice. *Twining* v. *New Jersey*, 211 U. S. 78, 53 L. Ed. 97; *Maxwell* v. *Dow*, 176 U. S. 581, 44 L. Ed. 597.

Arbitrary or capricious exercise of power whereby an invasion of property rights is practically sanctioned and the owner is accorded no real remedy violates the fundamental principles of due process. *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 27 A. L. R. 375.

Nor can these arbitrary denials of due process of law be justified as an exercise of the police power. An arbitrary or unreasonable exercise of police power is not justified. The state and its subdivisions are obliged to recognize, even in the exercise of their police power, the right of all persons to the security afforded by due process of law. *Eubank* v. *Richmond,* 226 U. S. 137, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123; *Buchanan* v. *Warley,* 245 U. S. 60, 62 L. Ed. 149, L. R. A. 1918C 210. Thus, Maplewood, if it desired to follow due process of law, could have condemned, by eminent domain, petitioners' property rights in the park, and, after cutting off their private rights, have held the necessary referendum to obtain the consent of its citizenry to the use of the park. It chose to ignore these necessary legal steps and the New Jersey Supreme Court refused to pass on the merits of our objections. A clearer case of lack of due process can hardly be imagined.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and that to such an end a writ of certiorari should issue to the Supreme Court of New Jersey and that the relief prayed for in the petition for writ of certiorari should be granted.

MILTON M. and ADRIAN M. UNGER,
Counsel for Petitioners.

ADRIAN M. UNGER,
Of Counsel.

[APPENDIX FOLLOWS]

APPENDIX A

Chapter 79, P. L. 1946

AN ACT to authorize any city, borough, village, town, township, or other municipality, other than a county or school district, to provide temporary or permanent safe and sanitary dwellings for citizens of this State, and to manage and maintain the same to borrow funds for such purpose and to issue municipal obligations therefor.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. It is hereby found and declared that the discharge of veterans engaged in World War II has resulted in the return to civilian life, in large numbers, of many persons for whom no adequate dwellings exist, and that an emergency exists in the total lack of safe, sound and sanitary dwellings for families of veterans of World War II and other citizens of this State, which causes untold hardship, overcrowding of existing dwellings, the occupation of substandard and insanitary houses, and creates a menace to the health, safety and moral and general welfare of the people, that it is vitally important that action be taken to provide adequate housing for such veterans and their families and for other citizens in the State and for the governing bodies of the municipalities of the State to provide safe, sound and sanitary dwellings in this crisis and to make appropriations and to borrow funds with which to provide such dwellings for its citizens and to issue notes, bonds, debentures or other municipal obligations therefor; and that the provision of necessary safe, sound and sanitary dwellings, as authorized by this act, is a public purpose and is for the public use.

2. As used in this act, unless a different meaning clearly appears from the context, (a) "municipality" shall mean any city of any class or any borough, village, town, township, or other municipality, other than a county or a school district; (b) "governing body" shall mean the commission, council, board, or body, by whatever name it may be known, having charge of the finances of the municipality; (c) "real property" shall mean lands and improvements thereof or thereon, or any rights or interests therein; and (d) "Federal Government" shall mean the United States of America, or any department, agent, or officer thereof, or any corporation created thereby.

3. No municipality shall exercise any of the powers conferred by this act unless its governing body shall, by resolution, determine that (1) the number of safe and sanitary dwellings within the municipality available for veterans and their families or other citizens is not adequate to meet the needs of such and their families and (2) the number of new dwellings within the municipality then in course of construction or for which applications for building permits have been filed within the municipality is not adequate to remedy the shortage in dwelling accommodations and (3) the shortage in dwelling accommodations, unless remedied, threatens the health, safety and morals of the public and (4) the shortage in dwelling accommodations cannot be remedied within any reasonable period of time otherwise than by provision of safe, sound and sanitary dwellings by public agencies and (5) the number of accommodations which the municipality will provide under the said resolution and whether the same will be temporary or permanent and the method of financing the construction or the erection of the same.

The governing body of any municipality which proposes to adopt such a resolution shall cause a copy of the proposed resolution to be published with a notice stating that, at a time and place specified in the notice, the governing body will hold a public hearing at which all persons attending shall be given an opportunity to be heard concerning the resolution and the determinations to be made thereby. The copy of the resolution and notice shall be published at least once in a newspaper printed and circulating in the municipality, if there be one, and if not, in a newspaper printed in the county in which such municipality is located and circulating in the municipality. If there be more than one such publication of notice, the first publication shall be at least ten days prior to the time fixed for the public hearing. The governing body shall hold a public hearing in accordance with the notice so published and all persons attending shall be given an opportunity to be heard concerning the resolution and the determinations to be made thereby. The resolution shall not be finally adopted until the public hearing has been completed and closed.

4. Any municipality shall have power to provide, in the manner prescribed and subject to the limitations imposed by this act, safe and sanitary dwellings suitable for the use of veterans and their families and other citizens of the State. In order to provide such dwellings any such municipality may acquire by purchase, lease or gift necessary real property, and may erect, reconstruct, alter or otherwise improve buildings, either permanent or temporary, and may acquire and install therein the furnishings and equipment necessary to render such buildings suitable for human habitation, and may construct any streets, sewers, water service pipes or other utilities, not competitive with any public utility as defined in section

48:2–13 of the Revised Statutes, necessary or convenient for the use of persons living in such dwellings, and may purchase or acquire by gift or rent from the Federal Government portable or temporary or movable dwellings and may accept donations of money or of materials, furnishings or equipment. Any such municipality may do any and all things necessary or advisable to co-operate with, or to act as agent for, the Federal Government, with respect to any housing procured from it, or to secure from the Federal Government financial aid in providing such dwelling accommodations.

5. The powers hereby granted to any municipality shall be exercised by its governing body. Notwithstanding the provisions of any other law, in exercising such powers the governing body shall act by resolution.

6. Any municipality providing dwellings by authority of this act shall have power to repair such dwellings from time to time and to maintain them in a condition suitable for human habitation. Such dwellings may be rented or leased upon such terms as may be prescribed by the governing body of such municipality. Such dwellings shall be rented or leased, first, to veterans of World War II, and, if there is not sufficient demand by the said veterans for the use of all of such dwellings, then the overplus may be rented or leased to other citizens of the municipality in need of such dwellings. The municipality is hereby authorized, if there is a local housing authority in such municipality, to appoint such local housing authority as managing agent for any or all of such dwellings to collect the rents therefor and to repair and maintain the same under such restrictions and limitations as the said municipality may care to appoint.

7. The governing body of any municipality which shall undertake to provide dwellings by authority of this act shall have power to make appropriations, from time to time, for any of the purposes described in section four of this act. The provisions of section 40:1–12 of the Revised Statutes shall not apply to any municipal bond ordinance authorizing the issuance of bonds or notes to finance any of such purposes. Notwithstanding anything contained in section 40:1–34 of the Revised Statutes the period of usefulness of any such purpose, according to its reasonable life, shall be twenty years or such shorter period as the governing body of such municipality may in its discretion determine.

8. The powers granted and the duties imposed by this act shall be construed to be independent and severable. If any one or more sections, subsections, sentences, or parts of this act shall for any reason be questioned in any court and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provisions so held unconstitutional or invalid.

9. None of the powers granted by section four of this act shall be exercised except by resolution passed prior to January first, one thousand nine hundred and forty-seven.

10. This act shall take effect immediately.

Approved April 12, 1946.

APPENDIX B

Chapter 321, P. L. 1946

AN ACT to amend the title ot "An act to authorize any city, borough, village, town, township, or other municipality, other than a county or school district, to provide temporary or permanent safe and sanitary dwellings for citizens of this State, and to manage and maintain the same to borrow funds for such purpose and to issue municipal obligations therefor," approved April twelfth, one thousand nine hundred and forty-six (P. L. 1946, c. 79), so that the same shall read "An act to authorize any city, borough, village, town, township, or other municipality, other than a county or school district, to provide temporary or permanent safe and sanitary dwellings for citizens of this State, and to manage and maintain the same, to borrow funds for such purpose and to issue municipal obligations therefor, and to make appropriations for such purpose," and to amend and supplement the body of said act.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. The title of "An act to authorize any city, borough, village, town, township, or other municipality, other than a county or school district, to provide temporary or permanent safe and sanitary dwellings for citizens of this State, and to manage and maintain the same to borrow funds for such purpose and to issue municipal obligations therefor," approved April twelfth, one thousand nine hundred and forty-six (P. L. 1946, c. 79), is amended to read "An act to authorize any city, borough, village, town, township, or other municipality, other than a county

or school district, to provide temporary or permanent safe and sanitary dwellings for citizens of this State, and to manage and maintain the same, to borrow funds for such purpose and to issue municipal obligations therefor, and to make appropriations for such purpose."

2. Section two of the act of which this act is amendatory and supplementary is amended to read as follows:

2. As used in this act, unless a different meaning clearly appears from the context, (a) "municipality" shall mean any city of any class or any borough, village, town, township, or other municipality, other than a county or a school district; (b) "governing body" shall mean the commission, council, board, or body, by whatever name it may be known, having charge of the finances of the municipality; (c) "real property" shall mean lands and improvements thereof or thereon, or any rights or interests therein; (d) "Federal Government" shall mean the United States of America, or any department, agent, or officer thereof, or any corporation created thereby; and (e) "State Government" shall mean the State of New Jersey, or any department, board, agency, authority, agent or officer thereof, or any public corporation created thereby.

3. Section four of the act of which this act is amendatory and supplementary is amended to read as follows:

4. Any municipality shall have power to provide, in the manner prescribed and subject to the limitations imposed by this act, safe and sanitary dwellings suitable for the use of veterans and their families and other citizens of the State. In order to provide such dwellings any such municipality may acquire by purchase, lease or

gift necessary real property, and may erect, reconstruct, alter or otherwise improve buildings, either permanent or temporary, and may acquire and install therein the furnishings and equipment necessary to render such buildings suitable for human habitation, and may construct any streets, sewers, water service pipes or other utilities, not competitive with any public utility as defined in section 48:2–13 of the Revised Statutes, necessary or convenient for the use of persons living in such dwellings, and may purchase or acquire by gift or rent from the Federal Government or the State Government portable or temporary or movable dwellings and may accept donations of money or of materials, furnishings or equipment. Any such municipality may do any and all things necessary or advisable to co-operate with, or to act as agent for, the Federal Government, or the State Government, with respect to any housing procured from it, or to secure from the Federal Government or the State Government financial aid in providing such dwelling accommodations.

4. Notwithstanding the provisions of any zoning or other municipal ordinance or building code to the contrary, the governing body of any municipality may, in its discretion, provide by resolution for the erection or reconstruction of any portable or temporary or movable dwelling unit or units, whether purchased or acquired from the Federal Government, or from the State Government, or otherwise, in or upon any area within such municipality, including any lands of such municipality held by it for park or other public use.

Any provisions of subtitle 1, of Title 55, of the Revised Statutes, relating to Tenement Houses, or of the regulations of the board of tenement house supervision of the State of New Jersey, to the contrary notwithstanding, any such municipality may, in its discretion, provide by reso-

interests therein; (d) "Federal Government" shall lution, for such erection or reconstruction of any such dwelling units on any such property; *provided, however,* that such units do not exceed two stories in height.

None of the powers granted by this section shall be exercised except by resolution passed prior to July first, one thousand nine hundred and forty-eight.

Any portable or temporary or movable dwelling unit or units erected, constructed or reconstructed by any municipality in violation of any zoning or other municipal ordinance or building code, or in violation of the provisions of subtitle 1, of Title 55 of the Revised Statutes, relating to Tenement Houses, or of the regulations of the board of tenement house supervision of the State of New Jersey, as authorized by this section, may be rented, leased, managed, operated or maintained for a period not in excess of five years from the date of the acquisition of such dwelling unit or units.

5. Section nine of the act of which this act is amendatory and supplementary is amended to read as follows:

9. None of the powers granted by section four of this act shall be exercised except by resolution passed prior to July first, one thousand nine hundred and forty-eight.

6. This act shall take effect immediately.

Approved October 1, 1946.